

**United States Department of Labor
Employees' Compensation Appeals Board**

A.R., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
CUSTOMS & BORDER PROTECTION,
El Centro, CA, Employer**

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**Docket No. 11-664
Issued: September 27, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 25, 2011 appellant filed a timely appeal from a November 23, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding his schedule award claim. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has more than 18 percent total impairment of the left upper extremity, for which he received a schedule award.

FACTUAL HISTORY

On August 2, 2006 appellant, then a 47-year-old border patrol agent, injured his left shoulder while lifting several boxes during the performance of his duties. OWCP accepted left

¹ 5 U.S.C. §§ 8101-8193.

shoulder tendinitis and bursitis and paid all appropriate compensation including left shoulder arthroscopy with arthroscopic labrum debridement, open rotator cuff repair and acromioclavicular joint resection, which he underwent on October 15, 2007. By decision dated October 7, 2008, it awarded appellant 16 percent permanent impairment of the left upper extremity, which a hearing representative affirmed in a June 1, 2009 decision.

Appellant requested reconsideration on June 22, 2009 and submitted a June 1, 2009 medical report from Dr. Stuart C. Marshall, a Board-certified orthopedic surgeon, who utilized the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*) in finding that appellant had 19 percent impairment of the left arm. This was based on 9 percent impairment for loss of shoulder motion and 10 percent impairment from excision of distal clavicle surgical procedure.² In an August 28, 2009 report, OWCP's medical adviser calculated appellant's permanent impairment under the fifth edition of the A.M.A., *Guides*. He concurred with Dr. Marshall that appellant had nine percent impairment from loss of motion and 10 percent impairment for a distal clavicle excision. OWCP's medical adviser combined these impairments to conclude that appellant had 18 percent permanent impairment of the left arm.

In a September 11, 2009 decision, OWCP found that appellant had 18 percent impairment of the left arm. It paid him for two percent impairment to his arm, noting that he previously received a schedule award for 16 percent left arm impairment. Appellant appealed to the Board.

In a September 14, 2010 order remanding case, the Board set aside OWCP's September 11, 2009 decision and remanded the case for further medical development.³ The Board noted that use of the sixth edition of the A.M.A., *Guides* became effective on May 1, 2009 but that OWCP's September 11, 2009 decision was based on the OWCP medical adviser's impairment rating that employed the fifth edition of the A.M.A., *Guides*. The Board directed that OWCP further develop the matter and issue a decision under the sixth edition of the A.M.A., *Guides*.

Following the Board's remand instructions, OWCP requested its medical adviser to review appellant's medical file and determine appellant's permanent impairment of the left upper extremity under the sixth edition of the A.M.A., *Guides*. On October 2, 2010 the medical adviser reviewed appellant's case file. Utilizing the sixth edition of the A.M.A., *Guides*, he opined that appellant had 12 percent upper extremity impairment for residual problems with the left shoulder under Table 16-6, page 403. The medical adviser stated that appellant had a class 1, E rating for residual problems with the left shoulder having undergone open rotator cuff repair with excision of the distal clavicle and documented loss of motion. He further opined maximum medical improvement was reached May 19, 2009, the date of Dr. Marshall's evaluation.

² Range of motion impairments were noted to be three percent impairment due to loss of shoulder flexion, two percent impairment for loss of shoulder abduction and four percent impairment for loss of shoulder internal rotation.

³ Docket No. 10-217 (issued September 14, 2010).

By decision dated November 23, 2010, OWCP denied appellant's request for an increased schedule award as the medical evidence did not demonstrate a permanent, measurable scheduled impairment greater than that already paid.

LEGAL PRECEDENT

The schedule award provision of FECA⁴ and its implementing regulations⁵ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.⁶ For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁷ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁸

The sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).⁹ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).¹⁰

OWCP procedures state that any previous impairment to the member under consideration is included in calculating the percentage of loss except when the prior impairment is due to a previous work-related injury, in which case the percentage already paid is subtracted from the total percentage of impairment.¹¹

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and

⁴ 5 U.S.C. §§ 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

⁷ *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁹ A.M.A., *Guides* 494-531.

¹⁰ *Id.* at 521.

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7.a(2) (January 2010).

percentage of impairment in accordance with the A.M.A., *Guides*, with OWCP's medical adviser providing rationale for the percentage of impairment specified.¹²

ANALYSIS

Appellant previously received a schedule award for 18 percent permanent impairment of the left upper extremity. The most recent award was based on the June 1, 2009 report from Dr. Marshall and the August 28, 2009 report of the OWCP medical adviser, both of whom used the fifth edition of the A.M.A., *Guides*. Dr. Marshall found that appellant had 19 percent impairment of the left arm based on loss of shoulder motion and impairment from excision of distal clavicle surgical procedure. OWCP's medical adviser essentially concurred with Dr. Marshall except for noting that total impairment under the fifth edition of the A.M.A., *Guides* was 18 percent, not 19 percent, as the impairments found by Dr. Marshall were not properly combined under the Combined Values Chart in the A.M.A., *Guides*. As noted, the Board remanded the case in the prior appeal finding that the award was improperly based on the fifth edition of the A.M.A., *Guides* instead of the sixth edition that became effective May 1, 2009. Consequently, upon remand, OWCP requested that its medical adviser calculate appellant's impairment under the sixth edition of the A.M.A., *Guides*.

In an October 2, 2010 report, OWCP's medical adviser properly calculated that appellant had 12 percent left upper extremity impairment under the sixth edition of the A.M.A., *Guides*. Under Table 15-5, page 403, he properly classified appellant's condition as class 1 for residuals left shoulder problems. In considering grade modifiers, the medical adviser noted the severity of appellant's condition, an open rotator cuff repair with excision of the distal clavicle for which there was documented loss of motion. Based on this, he determined that appellant qualified for grade E within the class 1 diagnosis for acromioclavicular joint injury or disease. This moved the impairment rating from the default grade C, 10 percent, to grade E, 12 percent, the maximum allowed for the class 1 diagnosis in the grid. There is no other current medical evidence in which any greater impairment has been calculated under the sixth edition of the A.M.A., *Guides*. Thus, the Board finds that appellant has no more than 12 percent permanent impairment of the left arm under the sixth edition of the A.M.A., *Guides*.

OWCP also properly concluded that appellant was not entitled to an increased award as it previously paid appellant schedule awards totaling 18 percent left arm impairment for his accepted left shoulder condition.¹³ Thus, the medical evidence does not support an increase in the 18 permanent impairment to the left arm for which appellant had already received schedule awards.

On appeal appellant argues that the impairment determination is substantially lower than he believes it should be due to his decreased ability to comfortably and effectively perform work functions and activities of daily living. To the extent appellant is arguing that his medical condition has not been taken into proper account during the impairment determination, the record

¹² See *id.* at Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

¹³ See *supra* note 11.

establishes that appellant's impairment was appropriately evaluated under the standards of the sixth edition of the A.M.A., *Guides*. There is no medical evidence of record supporting greater impairment. Furthermore, factors such as limitations on daily activities do not go into the calculation of a schedule award.¹⁴

Appellant may request an increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has no more than 18 percent total permanent impairment of the left upper extremity, which was previously paid.

ORDER

IT IS HEREBY ORDERED THAT the November 23, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 27, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹⁴ *E.L.*, 59 ECAB 405 (2008).